

FURTHER DEVELOPMENT OF CORPORATE GOVERNANCE AND CONTROLS

FIRST LESSONS FROM THE WIRECARD CASE

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1. PRELIMINARY REMARKS

The IDW takes the Wirecard case very seriously. It is detrimental to Germany's reputation as a financial center and has also led to questions concerning the role of the auditing profession in public. In isolated instances, third parties already perceive a (partial) failure of the entity's auditor, but also of auditors in general, and there are demands for significant changes to the way the profession is regulated.

The auditor concerned is subject to an all-encompassing statutory obligation of confidentiality, unless specifically granted release by the audited entity. The IDW is not privy to insider knowledge; all information has come from publicly accessible sources.

The Wirecard case is highly complex and therefore demands thorough analysis, as German Finance Minister Olaf Scholz has also noted. The clarification of the facts of this case has only just started. Any prejudgments of the individuals involved are therefore inappropriate, as are premature decisions concerning consequences, also further development of regulatory intervention.

Consideration should be given to setting up

a government-led commission to facilitate experts' involvement in discussions and developments of possible amendments to the regulatory framework, taking into account existing interdependencies. This commission should be composed of representatives from parliament, the government, affected parties and academia and it should ensure appropriate consultation with the relevant stakeholders.

Despite there still being many uncertainties concerning the facts of the matter, from today's perspective amendments to the audit model need to be considered. The audit is an important component of the German corporate governance system. Therefore further developments of the audit model will also require adjustments in the following areas: corporate governance of public interest entities (section 2), audit of financial statements of public interest entities (section 3), oversight of public interest entities and their auditors (section 4) and the role of (institutional) capital market participants (section 5).

In this context, it will be essential to accommodate the increasingly complexity and digital nature of business models and structures.



2. CORPORATE GOVERNANCE OF PUBLIC INTEREST ENTITIES

NOTE: In contrast to common law jurisdictions that have a single board comprising both executive and non-executive directors, the German system of corporate governance for business corporations applies a two-tier board system in which a Management Board is responsible for the day-to-day management of the entity, overseen, in certain respects, by a Supervisory Board. The Supervisory Board's oversight function with respect to financial reporting is specified in German law and includes the examination and approval of financial statements.

2.1. Initial situation

Wirecard clearly has a weak corporate governance system that has not kept pace in terms of its having developed from a start-up into a DAX 30 company. In an interview ("The Wirecard case is like a burning glass", Handelsblatt, July 3, 2020, p. 18), the Chairman of the German Commission on the German Corporate Governance Code, Prof. Dr. Rolf Nonnenmacher, pointed out existing weaknesses.

For example, in their declaration of compliance in accordance with Article 161 of the German Stock Corporation Act (Aktiengesetz (AktG)), the Management Board and Supervisory Board explain numerous deviations from the German Corporate Governance Code (Deutsche Corporate Governance Kodex (DCGK)), e.g. for a long time the company had not established an Audit Committee at all; the Chairman of the Supervisory Board was, for a time, also the Chairman of the Audit Committee, which was only set up in 2019; and the company did not comply with the 90-day publication deadline for financial statements provided for in the German Corporate Governance Code, instead taking advantage of the longer statutory periods. Furthermore, until 2016 the Supervisory Board consisted of only three persons, five until 2018 and only six from 2019. The name of the so-called financial expert member the Supervisory Board was not disclosed.

2.2. Proposals for further development

2.2.1. Adherence to the two-tier model

In the IDW's opinion, the German, two-tier corporate governance model has generally proven its worth. Contrary to the demands of some other parties, we do not believe a departure from this model would be advisable.

Instead, it is necessary to strengthen the supervisory bodies' competence, their ability to take action, and their independence. It would be appropriate to discuss a further development of the statutory regulations and the German Corporate Governance Code, including further specification of individual recommendations within this Code. In so doing, the Supervisory Board's responsibility to select the auditor according to quality criteria and for agreeing on an appropriate audit fee should be specifically included.

2.2.2. Description of the business model and its sustainability

The Wirecard case raises questions about the business model. Meaningful CSR reporting that supplements financial reporting provides the addressees with valuable information about the company's business model and its sustainable development, especially if CSR reporting and financial reporting are integrated.

The IDW advocates taking the discussions at European level on revising the CSR Directive as a chance to further develop CSR reporting as a whole. In future, the CSR report should form part of the management report or at least be published simultaneously. In the IDW's opinion, the Management Board should describe the entity's business model and its sustainability in such a way that a competent third party can understand and evaluate it.

2.2.3. Compliance management systems

The IDW suggests that the Management Board be required by law to establish an appropriate and effective compliance management system. This system, intended to ensure that the actions of the entity under its management comply with the applicable rules and regulations and thus to prevent financial crime, would need to be aligned to the entity's specific risk situation. In addition, the Management Board ought to report publicly on the basic features of the system and issue a statement confirming that it has established and is operating such a system in an appropriate manner.

As part of its supervisory responsibilities, the Supervisory Board ought to monitor the Management Board's compliance and then also examine whether the Management Board has fulfilled its duty to establish a workable, appropriate and effective compliance management system. The Supervisory Board should also be required to publish a statement on the results of its examination.

2.2.4. Declaration concerning the continuation of the entity's activities

The resilience of entities to both internal and external circumstances that could threaten their existence is crucial for Germany as a business location and for the confidence of the public and investors in the economic and social order. Corporate collapses of capital market-oriented entities shake this confidence, especially when they occur unexpectedly.

The IDW therefore suggests that the Management Board should be required by law to make an explicit statement in the financial statements that it is not aware of any facts or circumstances that stand in the way of the continued existence of the entity, at least in the twelve months after making the statement. The Supervisory Board ought to examine this declaration by the Management Board and then declare publicly that it has complied with its duty to examine this and that the Management Board is right to assume that the entity will continue its activities.

2.2.5. IT risks

IT risks, e.g., cyberattacks, can also reduce entities' resilience. The IDW therefore suggests clarifying in law that the entity's risk management system must also cover IT risks. The statement on the continuation of the entity's activities mentioned above should also include measures against possible IT risks that could threaten the entity's existence.

2.2.6. Obligation to establish an Audit Committee

In order to enhance the competence and capacity to act in the monitoring of entities, the IDW proposes, the Supervisory Board of a public interest entity – following what has become general practice – to be legally required to establish an Audit Committee comprised of suitably qualified individuals. The name of the financial expert should be disclosed. The Audit Committee should communicate regularly with the auditor, without the presence of the Management Board, whereby this exclusion should be set forth in the Audit Committee's procedural rules.

2.2.7. Publication of financial statements

In order to supply the capital market more efficiently with the information financial statement addressees require, and to strengthen the confidence of the players in Germany as a financial centre, the IDW proposes that the recommendation contained in the German Corporate Governance Code to date to publish the consolidated financial statements and the group management report within 90 days of the end of the financial year be required by law.



3. FINANCIAL STATEMENT AUDIT BY THE AUDITOR

3.1. Initial situation

3.1.1. Financial statements for the 2019 financial year

Doubts as to whether the accounting and business conduct of the responsible corporate bodies of Wirecard complied with the relevant laws and regulations were made public in relation to the audit of the financial statements for the year 2019. According to an ad hoc release published by Wirecard on June 18, 2020, the auditor informed the Management Board and the Supervisory Board of Wirecard AG that it had not yet been possible to obtain sufficient audit evidence regarding the existence of bank balances on trust accounts to be consolidated in the consolidated financial statements totaling EUR 1.9 billion (equivalent to around one quarter of the consolidated balance sheet total), i.e. that the auditor was unable to confirm the existence of bank balances, but, up to that point, was also unable to determine that they were incorrect. According to relevant press releases, the auditor has subsequently disclaimed the expression of an audit opinion for the 2019 financial year. Therefore, the audit for the financial year 2019 has effectively fulfilled its function.

In addition, there are clear indications that the Wirecard case involves extensive fraud involving several parties around the world and in various institutions with the intention of deliberate deception. The public prosecutor's office too has extended its investigations into the suspicion of inadmissible market manipulation to include possible management fraud.

3.1.2. Financial statements for previous financial years

The issues that have come to light concerning the 2019 financial statements neither serve to prove, nor to rule out, any misstatement of earlier financial statements. Were it to become clear that earlier financial statements had been (materially) misstated, it would be necessary to clarify whether the audits for these financial years had been carefully planned and performed with due care, and whether the auditor had reported appropriately. The independent Auditor Oversight Body (Abschlussprüferaufsichtsstelle (APAS) would be tasked with this investigation besides the public prosecutor.

Should the financial statements of previous financial years have been misstated and these misstatements not have been detected due to systemic deficiencies in the audit, it is the responsibility of the profession to remedy these deficiencies by taking appropriate measures.

Any possible misconduct of the auditor in recent years does not, of itself, provide justification for a general amendment of the regulatory framework for the audit of financial statements.

3.2. Proposals for further development

3.2.1. Use of forensic elements in the audit of financial statements

The IDW suggests that the statutory audit of public interest entities (PIE) should be more clearly focused on the detection of financial statement manipulation and the misappropriation of assets (fraud) than at present. The IDW will now develop an auditing practice note to highlight the importance of the analysis of the risk situation in relation to fraud, during audit planning. In particular this will outline which risk responses should include forensic audit procedures – applying modern technologies.

The IDW shares the opinion expressed by Prof. Dr. Thomas, CFO of Siemens AG ("We have to fight for the reputation of the financial centre", Börsenzeitung, 04.07.2020, p. 8) that consideration should also be given at entity level to establishing such forensic elements as part of the internal monitoring system. The IDW suggests that this would make sense, especially when dealing with information provided by whistleblowers.

3.2.2. Extending the scope of the audit of financial statements

The declaration of compliance to be submitted by the Management Board and Supervisory Board in accordance with Article 161 of the German Stock Corporation Act is not currently subject to audit.

NOTE: This Article requires the Management Board and the Supervisory Board of a listed entity (also applicable to an entity trading other securities as shares on an organized market defined pursuant to specific provisions in German securities trading legislation) make an annual declaration on a comply or explain basis of the entity's compliance with the recommendations set forth in the German Corporate Governance Code. This includes a requirement to explain the reasons for instances of non-compliance. The declaration must be made publicly available permanently on the entity's internet website.

For the addressees, it is therefore particularly unclear whether the Executive Board and Supervisory Board have actually explained all departures from the German Corporate Governance Code. To strengthen confidence in the accuracy and completeness of this compliance declaration, the IDW advocates that the declaration of compliance made by the Management Board and Supervisory Board be made a mandatory part of the audit of financial statements.

To provide enhanced support to the Supervisory Board in performing its monitoring function, the IDW suggests that the auditor should include audit procedures on the appropriateness and effectiveness of the compliance management system to be set up by the Management Board (see section 2.2.3) as part of the audit of financial statements. The same applies to the appropriateness and effectiveness of risk management with regard to IT risks (see section 2.2.5).

Finally, the IDW suggests that the auditor include an explicit statement on the declaration on the continuation of the entity's activities as proposed above (see Section 2.2.4) in the auditor's report in stating that no risks have come to the auditor's knowledge in the course of performing assurance procedures on the risk early warning system and the management report and audit procedures on the financial statements that could endanger the existence of the entity and that it is therefore permissible to assume that the entity will continue as a going concern.

3.2.3. Mandatory assurance for corporate, social responsibility (CSR) reporting

In contrast to financial reporting, the current legal situation in Germany does not require the auditor to obtain assurance on the CSR report. In order to improve the transparency of the business model and its sustainability, the IDW suggests a legal requirement be introduced for the CSR report to be subject to (reasonable) assurance. This can be covered as part of the finan-

cial statement audit, provided CSR reporting is integrated into financial reporting as proposed (see section 2.2.2).

3.2.4. Disclosure to a competent authority

The IDW suggests that instances of non-compliance with laws and regulations (NOCLAR), e.g. fraudulent acts, which have been identified during the audit of PIEs and which have not been remedied or are suspected, and which must currently be reported in the long-form audit report in accordance with Article 321 of the German Commercial Code (Handelsgesetzbuch (HGB)) should be reported to a body, that has yet to be determined by the Federal Government.

NOTE: In addition to an auditor's report on the financial statements that German business corporations must file with the commercial register and to which the general public has access, the German Commercial Code requires the auditor to submit to the Supervisory Board, when that board engaged the auditor, an additional written report [a so called long-form audit report] detailing certain specified information relating to the audit. This long-form audit report serves to provide confidential information to the Supervisory Board to aid that board in its own examination of the financial statements prior to its approval of those financial statements. The long-form audit report summarizes, in greater detail than the auditor's report, the subject, nature and scope, findings and results of the audit.

This also applies if the legal representatives or the supervisory body are not willing to investigate existing indications of fraud, e.g. by commissioning an external special investigation. Such a competent authority would need to be given the appropriate sovereign powers to follow up such indications. For this purpose, one consideration might be a further development of the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)), according to the rules already applicable to banks and insurance companies.

In addition, the IDW suggests that the auditor of a PIE also ought to report any significant deficiencies in the corporate governance system of an entity subject to audit to a body yet to be determined by the Federal Government if the entity itself is not willing to remedy these deficiencies immediately. Furthermore, whether the auditor should also have to report such findings in the auditor's report in future could also be discussed.

3.2.5. Rejection of other regulatory proposals put forward

In IDW's view, there is no evidence to suggest that the auditor procurement by public authorities might enhance auditor independence and audit quality. Already at present, it is not management of the entity subject to audit, but its shareholders/ owners who select the auditor. In the case of a German public limited company (Aktiengesellschaft – AG), the auditor is appointed by the Supervisory Board, which itself is responsible for monitoring the company. From the Supervisory Board's perspective, only an independent auditor can provide effective support in exercising its own monitoring role. It should also be borne in mind that the audit of financial statements is a highly complex service. The auditor needs to understand and evaluate the entity's business model, the situation in the industry, the entity's ownership and governance structure and, where applicable, its international links in order to identify, assess and respond appropriately to relevant risks of material misstatement. Auditor selection therefore necessitates indepth knowledge of both the entity as well as the potential auditor's credentials and capabilities. It therefore makes sense and remains appropriate for auditor selection and appointment to be in the hands of the owners of the entity subject to audit and the Supervisory Board, respectively. It is conceivable that the appointment of an auditor for capital market-oriented entities would have to be ratified by an independent state authority, as is currently already mandatory for banks and insurance companies.

Similarly, it is unclear why a blanket prohibition of consulting and advisory services for audit firms might enhance auditor independence and audit quality. The separation of audit and non-audit services is clearly regulated by law and is monitored by the Supervisory Board of the companies subject to audit. According to disclosures in the notes to the financial statements of Wirecard AG for 2018, auditor remuneration for other services was less than 15% of total auditor remuneration. The auditor did not provide any tax services or other assurance services.



4. SUPERVISION OF ENTITIES AND AUDITORS

4.1. Two-step enforcement procedure for the supervision of entities

4.1.1. Initial situation

The enforcement procedure in force in Germany for the examination of companies' financial reporting has a two-stage structure. In the first stage, the German Financial Reporting Enforcement Panel (Deutsche Prüfstelle für Rechnungslegung (DPR)), which is a government-appointed privately organised institution, checks compliance with national and international accounting standards on the basis of given facts. The Financial Reporting Enforcement Panel relies on entities' voluntary participation in this process. If the Financial Reporting Enforcement Panel finds violations or if the entity concerned fails to cooperate, the Federal Financial Supervisory Authority uses its sovereign powers to enforce the examination and publication of accounting errors at the second level when necessary.

In the wake of the Wirecard case, the German government intends to fundamentally rethink the current two-stage financial statement control mechanism and has therefore terminated the recognition agreement between the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz (BMJV)) and the Financial Reporting Enforcement Panel.

4.1.2. Proposals for further development

The IDW suggests that since, in the past, the two-stage enforcement procedure has proven itself to be quite successful it should be developed further. In addition, the state supervision by the Federal Financial Supervisory Authority should be expanded. As a minimum, so-called payment processors should be subject to the same supervision as banks and insurance companies. It is also necessary to examine whether the Federal Financial Supervisory Authority should also be granted supervisory powers over capital market-oriented entities in other sectors when there are suspicions of fraudulent activity, as this would ensure timely results.

4.2. Independent professional auditor oversight

4.2.1. Initial situation

The Auditor Oversight Body, which is independent of the profession, is one of the parties responsible for answering the question as to whether the auditor was in breach of professional duty in the Wirecard case. The Auditor Oversight Body is an independent and autonomous technical authority that, from an organizational perspective, operates within the Federal Office of Economics and Export Control (BAFA). Should further investigation of the Wirecard case reveal misconduct on the part of the auditor, it would have to be sanctioned according to the applicable designated measures.

The IDW supports an effective and independent oversight of the auditors of listed PIEs. The public's trust in this oversight is important for both stakeholders' and the public's confidence in the audit.

4.2.2. Proposals for further development

In order to improve the transparency of the German Auditor Oversight Body's activities and to further increase public confidence in the Auditor Oversight Body, the IDW suggests that in future the Auditor Oversight Body should report publicly on the investigations it has performed and the findings obtained, together with any statements thereon by the respective auditor.

Furthermore, the IDW suggests that either the Federal Ministry of for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie (BMWi)) or the Federal Office of Economics and Export Control should be given the opportunity to request the Auditor Oversight Body to conduct investigations related to specific events (right of initiative). Consideration should also be given to allowing the Auditor Oversight Body the possibility of becoming involved in ongoing audits in justified cases, in order to avoid potential audit errors.

Cooperation, and in particular, the sharing of information, between the Auditor Oversight Body, the Federal Financial Supervisory Authority and the Financial Reporting Enforcement Panel should be strengthened, where necessary by amending the legislation in respect of existing confidentiality requirements.



5. (INSTITUTIONAL) CAPITAL MARKET PARTICIPANTS

5.1. Initial situation

The shares of Wirecard AG have been traded in the DAX 30, the Prime Standard of the Frankfurt Stock Exchange, since September 2018. Based on the share price performance, among other things, one can observe that not many capital market participants have sanctioned the publicly known deficiencies in Wirecard's corporate governance, over a period of several years. Thus, for example, questions arise as to why institutional investors, voting rights advisors and analysts failed to react to the publicly available information and as to the basis they used for decision-making (investment and divestment decisions, recommendations on voting behavior at the Annual General Meeting, recommendations to buy or sell). The question also arises as to whether the respective share prices of Wirecard AG - especially in 2018 - were justified on the basis of the company's underlying data.

For capital market participants the main sources of information about an entity are its financial and non-financial reporting, the explanations on corporate governance and the entity's other

reporting. However, the accounting rules for financial reporting have not been adapted either nationally or internationally to the challenges of the modern digital world. Today's corporate reporting provides insufficient information about the characteristics of relevant value drivers in an entity.

5.2. Proposals for further development

5.2.1. Further development of requirements for capital market maturity

The IDW suggests that at least the listing in the DAX 30 – the figurehead of the German capital market – should not be based solely on market capitalization and trading volume. Instead there need to be appropriate requirements whereby listed entities would need to evidence their corporate governance.

5.2.2. Transparency about decisions

Finally, the IDW suggests that a discussion be held on whether and, if so, how the transparency in respect of the decisions made by institutional capital market participants could be improved.

5.2.3. Further development of financial reporting by entities

The IDW urges the international standard setter IASB and the German standard setter Accounting Standards Committee of Germany (Deutsches Rechnungslegungs Standards Committee e.V. (DRSC)) to develop solutions, in close consultation with all parties concerned, in order to further develop classical financial reporting in such a way that the value drivers of the digital economy can be presented to capital market participants in an informative way. Accounting for the individual relevant value drivers and the depreciation in value of these, then to be recognized, assets could significantly alleviate the wellknown issues associated with the recognition of goodwill. Moreover, the IDW advocates that, also for international financial reporting, goodwill should be subject to straightline depreciation.

For your notes:

This position paper was approved by the IDW Boards of Directors.

We are looking forward to receiving your comments. Please send them to Torsten Moser, Institut der Wirtschaftsprüfer in Deutschland e.V., Postfach 320580, 40420 Düsseldorf (by post) or to moser@idw.de by email.

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